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No. 81-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

AMBASSADOR COLLEGE,

Petitioner,

v.

SALLY J. GEOTZKE, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

W. WARREN PLOWDEN, JR.
Counsel of Record

HUBERT C. LOVEIN, JR.

ERIC D. GRIFFIN, JR.

500 Trust Company Bank Bldg.
Macon, Georgia 31298
(912) 745-2821

BEN B. MILLS

P. O. Box 408
Fitzgerald, Georgia

Attorneys for Petitioner

QUESTION PRESENTED

Do the first amendment freedoms of religion and associational privacy offer any protection in civil litigation to a church-related college from compulsory disclosure of the identity of its contributors, its income, and salaries paid to officers and trustees where the litigation involves a purely secular dispute?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows:

Petitioner: Ambassador College, a non-profit California corporation which was founded, endowed and is supported by, and trains the ministry of the Worldwide Church of God.

Respondants: Sally J. Geotzke; Honorable Hardy Gregory, Jr.; Honorable

Audrey B. Jordan; and the Superior Court of Ben Hill County, Georgia.

Neenah Bond
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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Ambassador College respectfully petitions for a writ of certiorari to review the judgment of the United States

Court of Appeals for the Eleventh Circuit in the above-entitled case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit is reported in 675 F.2d 662 (11 Cir. 1982).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 6, 1982. The order of the United States Court of Appeals for the Eleventh Circuit denying a timely petition for rehearing en banc was entered on June 4, 1982. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const. amend. I: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . . or the right of the people peaceably to assemble . . ."

U. S. Const. amend. XIV, §1: ". . . nor shall any state deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

On September 8, 1978, Sally J. Geotzke brought an action against Ambassador College and two of its trustees in the Superior Court of Ben Hill County, Georgia seeking to cancel and have set aside certain deeds to real estate executed by her mother, Mrs. Shaffer, to the College upon the grounds

of mental incapacity, undue influence and fraudulent misrepresentations.

Simultaneously with the filing of her complaint, Mrs. Geotzke filed seventeen interrogatories and six requests for production of documents to which Ambassador College timely filed answers and objections. The College's objections were based on its constitutional rights of free exercise of religion and freedom of association and privacy.

The trial court sustained some of the College's objections, but <u>without any finding of a compelling interest</u> justifying the infringement of the College's constitutional right to resist disclosure of the information requested, entered an order requiring the College to produce the following information:

(1) The names and information of persons in Georgia who have conveyed property by deed or trust agreement

to Ambassador College, or have executed a will devising property to Ambassador College.

(2) The amount of annual compensation paid to officers, directors and members of the board of trustees of Ambassador College and the Worldwide Church of God.

(3) The gross revenues of Ambassador College for the years 1974-1977.

(4) The compensation paid to Herbert W. Armstrong by Ambassador College and the Worldwide Church of God for the years 1974-1977.

Ambassador College filed a motion requesting that the trial court frame a protective order specifying the terms and conditions upon which discovery could proceed and relieving it from revealing matters protected against disclosure by the first amendment. The

College also requested a certificate of immediate review to appeal any orders requiring it to respond to the above-discovery requests to which it objected on constitutional grounds. Neither the motion for protective order nor the request for an interlocutory appeal were ever passed upon by the trial court.

Ambassador College maintained its right, absent some showing of compelling necessity, to refuse to answer this discovery on constitutional grounds, whereupon Mrs. Geotzke moved for impositions of sanctions, including dismissal of Ambassador College's answer and judgment in her favor.

The trial court entered an order finding that Ambassador College had willfully failed and refused to comply with the court's previous order requiring the College to produce the information set forth above and ordered

that Mrs. Geotzke have judgment against the College for the relief prayed for in her complaint unless answers and productions of documents were forthcoming within nine days.

The College continued to assert its constitutional rights to refuse to comply with the discovery order absent a showing of necessity by Ms. Geotzke and again sought a certificate of immediate review. This request was summarily denied and on April 10, 1979, judgment was granted to Mrs. Geotzke providing the relief sought in her complaint setting aside and cancelling the deeds in question as a cloud on the title to the real property in dispute.

Ambassador College then appealed to the Supreme Court of Georgia and by brief and oral argument urged that Court to hear its constitutional objections to the discovery sought of it by Mrs.

Geotzke. However, and as specifically recognized by the Eleventh Circuit in its opinion below:

> "[T]he Georgia court did not rule on Ambassador College's constitutional claim, rather it affirmed on the basis of the Georgia statute (Ga. Code Ann. § 81A-126) dealing with the relevancy of information sought in discovery."

Ambassador College v. Geotzke, 675 F.2d 662, 663 (11 Cir. 1982).

This Court denied a petition for a writ of certiorari. Ambassador College v. Geotzke, 444 U.S. 1079, 100 S.Ct. 1029, 62 L.Ed.2d 762 (1980).

Ambassador College next brought a civil rights action in the United States District Court for the Middle District of Georgia, against Respondents Sally J. Geotzke, Honorable Hardy Gregory, Jr., Honorable Aubrey D. Jordan and the Superior Court of Ben Hill County, Georgia, under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. In its

complaint Ambassador College sought a declaratory judgment that the dismissal order entered against the College in the Ben Hill Superior Court action was unconstitutional as depriving the College of its rights protected by the first and fourteenth amendments and as depriving the College of its property without due process of law. Ambassador College sought a permanent injunction restraining respondents from enforcing the operation of this judgment and from taking any further actions or proceedings with respect to the property which is the subject matter of the judgment.

Upon motions by all respondents, the United States District Court entered an order on May 30, 1980 dismissing the College's complaint on the grounds that it did not have subject-matter jurisdiction. An appeal followed.

The Eleventh Circuit affirmed the district court's dismissal of the action holding that Ambassador College had presented no colorable first amendment claim. The Eleventh Circuit therefore saw no need to consider whether the district court had jurisdiction to determine if the Superior Court of Ben Hill County, Georgia denied the College a due process right by refusing to address its constitutional claims.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Fundamental First Amendment Principles Enunciated by This Court and Decisions of Lower Courts Applying Those Principles

It is important to note at the outset that the obvious religious standing of Ambassador College as the type of organization entitled to the

protection afforded individuals and churches by the Constitutions of the State of Georgia and the United States is not questioned, nor could it be.

This Court has clearly and consistently recognized a right of association for the purpose of seeking goals independently protected by the first amendment. Buckley v. Valeo, 424 U.S. 1 (1976); Cousins v. Wigoda, 419 U.S. 477 (1975); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958). A particularly well-established instance of the right of associational freedom has been the recognition of the integrity and autonomy of religious associations. Kedroff v. St. Nicholas Cathedral, 344 U.S. 95 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

Additionally, it is undisputed that the discovery information sought of

the College by Mrs. Geotzke in the Ben Hill Superior Court action is of a type which this Court has consistently recognized as being protected from state-compelled disclosure. It is well settled constitutional law that the right of association enables persons to associate freely and privately in the exercise of first amendment rights (such as supporting religious educational institutions) and the organizations they form to resist state instigated or compelled inquiries as to who are its members, what are the sources of its income, and to what end these funds are expended. NAACP v. Alabama, 357 U.S. 449 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); Britt v. Superior Court of San Diego County, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695

(1978).

Without questioning the obvious religious standing of Ambassador College as the type of organization entitled to protection offered by the first amendment against state-compelled disclosure and without disputing that the type of information sought to be discovered in this case is of a type which is protected against state-compelled disclosure by the first amendment, the Court below nonetheless erroneously holds that Ambassador College has no right of free exercise of religion to resist discovery in civil litigation proceedings where the issue involved is a secular dispute and there is no danger of governmental monitoring or potential for regulating religious activity:

> "There is no danger of government seeking to monitor or regulate a religious group. Indeed, the only government involvement in this case at all is the Georgia trial court's

> enforcement of the discovery order. We find that there are simply no free exercise considerations of even arguable validity raised by Ambassador College." Ambassador College v. Geotzke, 675 F.2d at 664.

This holding by the Court below is nothing short of a total abandonment of the time-honored principles enunciated by this Court that first amendment freedoms, ". . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference" Bates v. City of Little Rock, 361 U.S. at 523 and that any ". . . state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." NAACP v. Alabama, 357 U.S. at 461. (emphasis supplied). As succinctly put by Justice Tobriner of the Supreme Court of California:

> "Our decision in the present case breaks no new constitutional ground. As we have explained, it has been clear for over two decades that the

> First Amendment provides substantial protection of an individual's interest in associational privacy in that it places severe restrictions on state-compelled disclosure of private affiliations and activities. The present decision simply recognizes that these firmly established constitutional precepts cannot be ignored merely because the issue of compelled disclosure arises in the context of litigation discovery; in this realm, as in all others, such disclosure of confidential associational affiliations and activities must be justified by a compelling state interest and must be precisely tailored to avoid undue enfringement of constitutional rights." Britt v. Superior Court of San Diego County, 574 P.2d at 779.

Furthermore, the threat to first amendment freedoms may be even more severe in the civil litigation discovery context, regardless of governmental entanglement:

> "This chilling effect on First Amendment rights is not diminished simply because disclosure is compelled pursuant to a litigation-oriented discovery order. Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual

may prefer to keep confidential." Id. at 774.

Indeed, considering the importance of private fund raising to the very existence of private church-related education in this country, it is readily apparent that the potential danger to first amendment freedoms by state-compelled disclosure by a church-related college of information protected by the first amendment is quite the same regardless of whether the party seeking disclosure is a governmental entity which could use the information to regulate or monitor a church group or whether the party seeking disclosure is a private party engaged in a purely secular dispute.

Private fund raising is and must be the primary source of support for private education. As such, it goes without saying that the rights of con-

tributors to private education to make their gifts in complete confidence must be protected.

It is most improbable therefore that any church or church-related educational institution, would be willing to turn over a list of persons who have bequeathed property to the church or church-related school or disclose financial information of questionable relevance about its officers. If there is to be compulsory disclosure of such information in civil litigation discovery proceedings without any protection afforded to churches and schools in the form of requiring the party seeking discovery to make a showing of compelling necessity, case after case would end in automatic judgments for plaintiffs as the churches and schools would certainly refuse to allow harassments of their donors.

Clearly, the first amendment freedoms of religion and associational privacy stand as protectors of the churches, schools, and their contributors against parties whose only objective is to harass their opponents into submission through pervasive discovery of marginally relevant and highly sensitive data. At issue is the fund-raising capabilities and thus the very life of many church-related colleges and universities.

In short, the real danger is state-compelled disclosure, regardless of the status of the party seeking disclosure or his purpose. The fundamental goals of free expression of ideas and exploration of alternatives is equally at stake whether the party seeking disclosure is a private party in a purely secular dispute or, on the other hand, is a governmental entity

seeking to regulate and monitor a religious group. If these goals are to be attained and protected, our Constitution simply cannot tolerate a recognition of a privilege against compulsory disclosure in one instance and not the other.

A. Are Associational Relationships of Religious Organizations Presumptively Entitled to First Amendment Protection or Must the Entity Asserting the Right Overcome Some Threshold Substantiation Requirement?

A focal point for the Court below in reaching its decision that Ambassador College has presented no colorable first amendment claim was its conclusion that "Ambassador College has not demonstrated how its religious liberty would be enfringed upon if it is required to answer the questions put to it." Ambassador College v. Geotzke, 675 F.2d at 664. This too flies in the face of settled constitutional principles.

The free exercise and associational privacy freedoms asserted by Ambassador College ". . . are presumptively immune from inquisition . . ." Sweezy v. New Hampshire, 354 U.S. 234, 265-266, 77 S.Ct. 1203, 1219, 1 L.Ed. 2d 1311 (1957) (Frankfurter, J. concurring), and the party seeking the disclosure always bears the burden of demonstrating its justification. See, e.g., Baird v. State Bar of Arizona, 401 U.S. 1, 6-7, 91 S.Ct. 702 27 L.Ed. 2d 639 (1971). See also Bursey v. United States, 466 F.2d 1059, 1082 (9th Cir. 1972) ("The burden rests on the government to establish that the particular [protected] relationships are outside its reach."); Surinach v. Pesquera de Busquets, 604 F.2d 73, 75 (1st Cir. 1979) (The state must show that its practices will "not ultimately enfringe upon and entangle it in the affairs of the religion to an extent

which the Constitution will not countenance.")

Thus, it is clear error for the Court below to place any burden on Ambassador College to prove that compelling discovery of the information requested will unduly enfringe upon its constitutional freedoms. The burden remains on Mrs. Geotzke to prove that it will not and no such showing has ever been made.

B. What Showing Must a Party Seeking Discovery in Civil Litigation Make in Order to Outweigh His Opponents First Amendment Interest?

This Court has consistently held that although the right of associational privacy is not absolute, it can be overcome only by a showing by the State of a subordinating interest which is compelling Buckley v. Valeo, 424 U.S. at 25; Bates v. City of Little Rock, 361 U.S. at 524.

Although the response of the lower federal and state courts as to how the party seeking discovery goes about showing this compelling interest has been varied and confusing, specific steps are now emerging in lower federal court decisions for determining whether a civil litigant has made a sufficient showing of necessity. These include:

(1) Can the information be discovered through alternative sources and has the party seeking disclosure made reasonable attempts to obtain the information elsewhere;

(2) Does the information go to the heart of the lawsuit;

(3) Whether the information is of certain relevance; and

(4) What type of controversy is involved.

See International Union v. National Right to Work Legal Defense and

Education Foundation, Inc., 590 F.2d 1139 (D.C. Cir. 1978); Silkwood v. Kerr-McGee Corporation, 563 F.2d 433 (10th Cir. 1977); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974); Garland v. Torre, 259 F.2d 545 (2nd Cir. 1958); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

If certiorari is granted, we will argue that as a minimum, this Court should now impose a national standard of strong and overwhelming need as in the case of the federal decisions cited above. It is conceded that in an appropriate case, a showing of necessity may very well outweigh a litigant's constitutional freedoms. On the other hand, in other cases, the strongest possible showing of need may not be sufficient to justify or outweigh the chilling effect on first amendment rights that disclo-

sure would produce.

In any event, absent any showing by a civil litigant when a proper constitutional objection to discovery is asserted, as in the case at bar, a civil litigant should not be allowed to have free and unchecked reign to harass an opponent into submission by simply causing the opponent to insist upon its constitutional freedoms. Not only would such a scheme be contrary to the very basic idea of judicial fair play, but, as in the instant case, where the party resisting discovery is a church-related school, such a practice could have profound impact on such an institution's basic right to exist.

CONCLUSION

We respectfully urge the Court, for all the reasons set forth above, to

grant a Writ of Certiorari and to reverse the decision below.

Respectfully submitted,

W. WARREN PLOWDEN, JR.
Counsel of Record

HUBERT C. LOVEIN, JR.

ERIC D. GRIFFIN, JR.

BEN B. MILLS

Attorneys for Petitioners